



PATENT
ATTORNEY DOCKET NO.: 21276.00.9044

THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re the Wright, et al.)
application of:)
Serial No.: 09/415,696) Examiner: Jes F. Pascua
Filed: October 12, 1999) Group Art Unit: 3727

TITLE: RECLOSABLE FASTENER PROFILE SEAL AND METHOD OF FORMING A FASTENER
PROFILE ASSEMBLY

MAIL STOP AF
Commissioner for Patents
P.O. Box 1450
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CERTIFICATE OF MAILING
EXPRESS LABEL NO. EV320527409US

I hereby certify that these papers are being deposited with the United States Postal Service by Express Mail, postage pre-paid, on this date November 1, 2004, in an envelope addressed to: MAIL STOP AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

Carmen M. Camarena Nov. 1, 2004
Carmen M. Camarena Date

TRANSMITTAL OF APPEAL BRIEF

Transmitted herewith, in triplicate, is the Appeal Brief and a Supplemental Submission to the Appeal Brief in this application, with respect to the Notice of Appeal filed on August 30, 2004.

This application is on behalf of a small entity.

Pursuant to 37 C.F.R. §1.17(c), the fee for filing the Appeal Brief is \$170.00 for a small entity.

Authorization is hereby made to charge the amount of \$170.00 to Deposit Account No. 22-0259. The Commissioner is also authorized to charge any additional fees required by this paper or credit any overpayment thereof to Deposit Account No. 22-0259.

A duplicate of this paper is attached.

Respectfully submitted,

Vedder, Price, Kaufman & Kammholz, P.C.

By: Robert S. Beiser
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Dated: November 1, 2004

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11-02-04

IFW AF/3727

PATENT



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

IN RE THE APPLICATION OF
WRIGHT, et al.

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Examiner: J. Pascua

Serial No.: 09/415,696

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Art Unit No.: 3727

Filed: October 12, 1999

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Docket No. 21276.00.9044

For: RECLOSABLE FASTENER PROFILE SEAL AND METHOD
OF FORMING A FASTENER PROFILE ASSEMBLY

Assistant Commissioner for Patents
P.O. Box 1450
Arlington, VA 22313-1450

ATTENTION: BOARD OF PATENT APPEALS AND INFERENCES

SUPPLEMENTAL SUBMISSION TO APPELLANT'S BRIEF
UNDER 37 C.F.R. 1.192

11/03/2004 HALI11 00000014 220259 09415696

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SUPPLEMENTAL SUBMISSION TO APPELLANT'S BRIEF
UNDER 37 C.F.R. 1.192

The attached Office Action was received November 1, 2004, withdrawing the rejection of Claims 1, 4-10, 18 and 19 under the judicially created doctrine of obviousness-type double patenting, the rejection of Claim 18 under 35 U.S.C. §102, the rejection of Claims 1, 4-10 and 19 under 35 U.S.C. §103, and the rejection of Claims 1, 4-10, 18 and 19 under the principles of *res judicata*. Accordingly, Issue 1 of the Appeal Brief as to Res Judicata of Claims 1, 4-10, 18 and 19 and Issue 4 as to the rejection of Claim 18 over Sprehe '457 have been resolved.

Respectfully submitted,

Robert S. Beiser

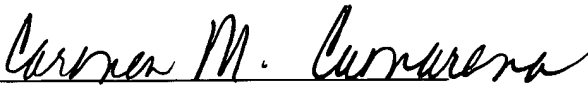
Robert S. Beiser
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Dated: November 1, 2004



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This is to certify that the foregoing SUPPLEMENTAL SUBMISSION TO APPELLANT'S BRIEF is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 C.F.R. § 1.10, on the date indicated below and is addressed to the Assistant Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313-1450, on this 1st day of November 2004.


Carmen M. Camarena



UNITED STATES PATENT AND TRADEMARK OFFICE

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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/415,696	10/28/2004	DONALD K. WRIGHT	21276-9044	5181

7590
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EXAMINER

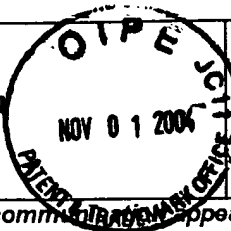
PASCUA, JES F

ART UNIT	PAPER NUMBER
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3727

DATE MAILED: 10/28/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action

Application No.

09/415,696

Examiner

Jes F. Pascua

Applicant(s)

WRIGHT ET AL.

Art Unit

3727

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 30 August 2004 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☒ A Notice of Appeal was filed on 30 August 2004. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☒ The proposed amendment(s) will not be entered because:
- (a) ☒ they raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☐ they raise the issue of new matter (see Note below);
- (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet.

3. ☒ Applicant's reply has overcome the following rejection(s): See Continuation Sheet.
4. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☒ The a) ☐ affidavit, b) ☒ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☒ For purposes of Appeal, the proposed amendment(s) a) ☒ will not be entered or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: None.

Claim(s) objected to: None.

Claim(s) rejected: 1,4-10,18 and 19.

Claim(s) withdrawn from consideration: 13-17 and 21-26.

8. ☐ The drawing correction filed on _____ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____.
10. ☐ Other: _____

Jes F. Pascua
Primary Examiner
Art Unit: 3727

Continuation of 2. NOTE: The proposed addition of Webster's New Collegiate Dictionary definition for the term "airtight" raises the issue of new matter .

Continuation of 3. Applicant's reply has overcome the following rejection(s): The Terminal Disclaimer filed 08/30/2004 overcomes the rejection of claims 1, 4-10, 18 and 19 under the judicially created doctrine of obviousness-type double patenting, the rejection of claim 18 under 35 USC 102 and the rejection of claims 1, 4-10 and 19 under 35 USC 103. The 9/10/03 declaration of Paul Tilman overcomes the the rejection of claims 1, 4-10, 18 and 19 under the principles of res judicata.

Continuation of 5. does NOT place the application in condition for allowance because: The declaration of Tilman does not specifically refer to the Webster's New Collegiate Dictionary definition of "airtight". The references of Howard and Anderson meet the recited structure of the claims .



PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

IN RE THE APPLICATION OF
WRIGHT, et al.

Serial No.: 09/415,696

Filed: October 12, 1999

For: RECLOSABLE FASTENER PROFILE SEAL AND METHOD
OF FORMING A FASTENER PROFILE ASSEMBLY

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) Examiner: J. Pascua

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) Art Unit No.: 3727

)
) Docket No. 21276.00.9044

Assistant Commissioner for Patents
P.O. Box 1450
Arlington, VA 22313-1450

ATTENTION: BOARD OF PATENT APPEALS AND INFERENCES

APPELLANT'S BRIEF
UNDER 37 C.F.R. 1.192

APPELLANT'S BRIEF
UNDER 37 C.F.R. 1.192

Appellant has appealed from the rejection of Claims 1, 4-10, and 18-19 in the final Office Action dated May 28, 2004. This appeal brief is submitted in triplicate as required by 37 CFR 1.192(a).

I. REAL PARTY IN INTEREST

The parties named in the caption, Donald K. Wright et al., are the inventors and applicants and have assigned their entire interest in the invention to appellant Com-Pac International, Inc., a corporation having a place of business at 800 Industrial Park Road, P.O. Box 270, Carbondale, Illinois 62902.

II. RELATED APPEALS AND INTERFERENCE

With respect to other appeals or inferences that will directly affect, or be directly affected by, or have a bearing on the Board's decision in this appeal is as follows:

Appeal No. 2003-0068 filed June 17, 2002.

III. STATUS OF CLAIMS

This application was originally presented with Claims 1-21, inclusive. Claims 1, 4-10 and 18-19 were rejected. Claims 2-3, 11-17, 20 and 21 have been withdrawn. All of these claims are reproduced herewith to avoid confusion as to their status and the nature of the rejections/objections.

IV. STATUS OF AMENDMENTS

Applicant timely filed a response to the Official Action of May 28, 2004, on August 30, 2004, and the amendment was entered in part. Accordingly, the claims presented on appeal do not require further amendments.

V. SUMMARY OF THE INVENTION

The present invention provides a reclosable fastener profile seal assembly and a reclosable storage bag including the assembly. The reclosable fastener profile assembly comprises a first profile strip including at least one rib that extends from the surface of the first strip and a second profile strip opposite the first strip. The second strip includes at least two ribs that extend from the surface of the second strip. The rib of the first strip and the ribs of the second strip are adapted to sealingly engage and maintain an airtight seal when so engaged.

The assembly also comprises a compression molded segment seal which includes a fused section of the first and second profile strips formed through the application of heat and pressure. The fused section is substantially flattened to form an airtight seal of the first and second profile strips, without distorting the ribs of the first and second profile strips outside of the fused section, thereby maintaining the airtight seal of the first and second profile strips when interlocked.

The invention reclosable storage bag further includes having a first bag wall, a second bag wall and a reclosable fastener profile assembly as described above.

In one embodiment, the individual reclosable fastener profiles are supplied in relatively great lengths, thereby providing a continuous linear strip of fully formed reclosable bag profiles. In such an embodiment, the completed reclosable fasteners may be wound onto a roll for later separation and addition to bag walls.

VI. STATEMENT OF THE ISSUES

The issues presented on this appeal are:

1. Whether Claims 1 4, 6-8, 10 and 18-19 are patentable under 35 U.S.C. Section 102(b) over U.S. Patent No. 5,071,689 issued to Tilman on December 10, 1991.

2. Whether Claims 1, 4, 6-10 and 18-19 are patentable under 35 U.S.C. § 102(b) over U.S. Patent 3,986,914, issued to Howard et al. on October 19, 1976.

3. Whether Claims 1, 4-10, 18 and 19 are patentable under 35 U.S.C. § 102(e) over U.S. Patent 6,033,113, issued to Anderson on March 7, 2000.

4. Whether Claim 18 is patentable under 35 U.S.C. § 102(e) over the patent of Sprehe et al., U.S. Patent No. 6,059,457, issued May 9, 2000.

VII. GROUPING OF THE CLAIMS

Questions presented:

1. Does the patent of Tilman anticipate Applicant's, invention, in view of the Declaration of Tilman, that the seal in his '689 patent is not airtight under any definition of airtight?

2. Does the liquid tight bead seal of Howard's '914 anticipate the airtight compression molded seal of Applicant's invention?

3. Does the reclosable bag of Anderson, which uses a gap filling fillet of a different material to seal the zipper closure, anticipate Applicant's bag and zipper closure?

4. Does the bag of Sprehe's '457 patent having "crimped" ends on the first and second fastener strips anticipate Applicant's bag with compression molded fastener strips substantially flattened to form an airtight seal?

A. TOTAL NUMBER OF CLAIMS IN APPLICATION

The total number of claims in the application are 26.

B. STATUS OF ALL OF THE CLAIMS

Claim 1 (previously amended): A reclosable fastener profile assembly, said assembly comprising:

a continuous supply of a first profile strip including at least one rib that extends from the surface of said first strip;

a continuous supply of a second profile strip opposite said first strip; said second strip including at least two ribs that extend from the surface of said second strip; said rib of said first strip and said ribs of said second strip adapted to sealingly engage and maintain an airtight seal when so engaged;

a compression molded segment seal portion fusing said first profile strip, said second profile strip and said ribs of said first profile strip and said second strip; said compression molded segment seal including a fused section of said first and second profile strips formed through the application of heat and pressure; said fused section substantially flattened to form an airtight seal of said first and second profile strips, without distorting said ribs of said first and second profile strips outside of said fused section, thereby maintaining said airtight seal of said first and second profile strips when interlocked; and

said compression molded segment seal portion having a thickness less than the combined thickness of said first profile segment and said second profile segment.

Claim 2 (canceled)

Claim 3 (canceled)

Claim 4 (previously presented): The reclosable fastener profile assembly of Claim 1, wherein said compression molded segment seal includes a severing portion of said first profile strip and said second profile strip for cutting said fastener profile and creating an individual profile fastener assembly.

Claim 5 (original): The reclosable fastener profile assembly of Claim 1, wherein said continuous supply of first profile strips, said continuous supply of second profile strips and a plurality of said compression molded segment seal create a continuous linear supply of profile fastener assemblies.

Claim 6 (original): The reclosable fastener profile assembly of Claim 1, wherein said first profile strip and said second profile strip are configured to fittingly mate together such that said first profile strip is flush with said second profile strip when said first profile strip and said second profile are engaged.

Claim 7 (original): The reclosable fastener profile assembly of Claim 1, wherein said ribs of first and second strips have respective head portions and neck portions, wherein said head portions are accurate in profile.

Claim 8 (original): The reclosable fastener profile assembly of Claim 1, wherein said first strip includes a first end and a second end, said second strip further including a first end and second end, wherein respective first ends and respective second ends of said first and second strips are created through application of said compression molded segment seal.

Claim 9 (original): The reclosable fastener profile assembly of Claim 1, wherein said ribs of said first and second strips have respective head portions and neck portions, and wherein said head portions are wider than said neck portions.

Claim 10 (original): The reclosable fastener profile assembly of Claim 1, wherein said second strip includes one more rib than said first strip.

Claim 11 (canceled)

Claim 12 (canceled)

Claim 13 (withdrawn)

Claim 14 (withdrawn)

Claim 15 (withdrawn)

Claim 16 (withdrawn)

Claim 17 (withdrawn)

Claim 18 (previously amended): A reclosable storage bag comprising:

a first bag wall;

a second bag wall;

a reclosable fastener profile assembly, said assembly comprising:

a first profile strip including at least one rib that extends from the surface of said first strip;

a second profile strip opposite said first strip said strip including at least two ribs that extend from the surface of said second strip; said rib of said first strip and said ribs of said second strip adapted to sealingly engage and maintain an airtight seal when so engaged;

a compression molded segment seal portion fusing said first profile strip, said second profile strip and said ribs of said first profile strip and said second profile strip; said compression molded segment seal including a fused section of said first and second profile strips formed through the application of heat and pressure; said fused section substantially flattened to form an airtight seal of said first and second profile strips, without distorting said ribs of said first and second profile strips outside of said fused section, thereby maintaining said airtight seal of said first and second profile strips when interlocked; wherein said first profile strip and said second profile strip are heat sealed to said first bag wall and said second bag wall, respectively; and

said compression molded segment seal portion having a thickness less than the combined thickness of said first profile segment and said second profile segment.

Claim 19 (previously amended): The reclosable fastener profile assembly of Claim 1, wherein said profile assembly further includes:

a first bag wall;

a second bag wall where edges of said first and second bag walls are sealed together thereby defining an inner bag; and

said compression molded segment seal portion having a thickness less than the combined thickness of said first profile segment and said second profile segment.

Claim 20 (canceled)

Claim 21 (withdrawn)

Claim 22 (withdrawn)

Claim 23. (withdrawn)

Claim 24 (withdrawn)

Claim 25 (withdrawn)

Claim 26 (withdrawn)

C. CLAIMS ON APPEAL

The claims on appeal are: Claims 1, 4-10, 18 and 19.

ARGUMENT

1. Claims 1, 4-10, 18 and 19 stand rejected under 35 U.S.C. §102(b) as being anticipated by Tilman '689 for the reasons set forth in the Board's decision of July 11, 2003.

The present case is a Request for Continued Examination in light of the Declaration of Paul A. Tilman. Mr. Tilman is the sole inventor of U.S. Patent No. 5,071,689, hereafter referred to as the '689 patent, which is the reference upon which the pending claims were rejected – ostensibly because the '689 patent inherently taught an airtight seal.

In the parent case to the present application, claims similar to Claims 1, 4-10, 18 and 19 were rejected by the Board because the Examiner alleged, and the Board agreed, that the '689 patent inherently disclosed an airtight seal. The Board stated on page 7 of the Decision that: "the Tilman '689 disclosure [was] sufficient to reasonably support the examiner's determination that the spot seal 21 of Tilman '689 [possessed] the...limitations recited in the last paragraph of claim 1 so as to establish a *prima facie* case of anticipation and thereby shift the burden to appellants to prove that the seal of Tilman '689 does not possess such features." (Emphasis added.)

In response to the Board's admonition to prove that the seal of Tilman '689 is not airtight, the applicants have enclosed the Declaration of Paul A. Tilman, who as the sole inventor of the '689 patent states that the '689 patent does not teach an airtight seal under any definition of airtight. Mr. Tilman's declaration proves that the '689 patent does not show, suggest, or imply an airtight seal.

In particular, paragraph 11 of the Tilman declaration states that FIG. 4 of the '689 patent shows a small space between the spot seal 21 and the terminal extent of the female

base 14 where there is no seal structure. This small space is clearly identified in the Tilman declaration.

As stated in paragraph 10 of the Tilman declaration, the female base 14 and the arrow-shaped protuberance 15 that form a reclosable seal do not extend all the way to the spot seal because of the heat and mechanical deformation used to form the spot seal. The air-passage space is encircled and identified in the Tilman Declaration as an "AIR GAP REGION."

As the sole inventor of the inventor of the '689 patent, Mr. Tilman is the person most knowledgeable about the seal structure and methodology disclosed in the '689 patent. (Decl. of Paul A. Tilman, ¶8.) According to Mr. Tilman, the spot sealing disclosed in the '689 patent cannot produce an airtight seal because the air gap between the spot seal and the sealing profiles that will let air freely pass. (Decl. of Paul A. Tilman, ¶13) According to Mr. Tilman, the seal structure and methodology disclosed in the '689 patent will not produce an airtight seal, regardless of how the word "airtight" is defined. (Decl. of Paul A. Tilman, ¶14.)

Mr. Tilman's declaration clearly and irrefutably establishes that the Examiner's reliance upon the '689 patent was improper. In light of the Declaration of Paul A. Tilman, allowance of pending Claims 1, 4-10, 18 and 19 is respectfully requested.

The Examiner has indicated that, although the Tilman Declaration states that the seal of '689 patent is not airtight under any definition of airtight, the Examiner is still not convinced that the Tilman's definition of airtight seal is commensurate with Applicant's definition as set forth in the specification of the present application. However, the Examiner further indicates that Applicant's specification fails to provide any specific

definition of “an airtight seal”. Accordingly, Applicant has submitted to the Examiner *Webster’s New Collegiate Dictionary* which defines airtight as “impermeable to air or nearly so.” As well settled, the dictionary definitions provide evidence of a claim terms ordinary meaning: *Texas Digital Systems v. Telegenics, Inc.*, 308 F.3d 1193, 1202 (Fed. Cir. 2002). Thus, whether using the dictionary definition of “airtight” or Tilman’s statement that his reference does not teach an airtight seal under any definition of “airtight,” it is clear that Tilman does not anticipate either specifically or inherently an airtight seal. The Examiner suggests that, because Applicant says there is a “wide range of applications” for their “airtight seal” that Applicant’s definition is broader in scope than air molecules at atmospheric pressure and room temperature as discussed by Tilman.

Tilman’s definition of “airtight seal” is commensurate with Applicant’s definition as set forth in the specification of the present application. In paragraph 6 of the Tilman declaration, it states that “[A]n ‘airtight seal’ is a seal that will at least prohibit the movement of atmospheric pressure, room-temperature air molecules across the seal for an indefinite length of time.” Applicant’s specification fails to provide any specific definition of an “airtight seal.” At best, Applicant mentions in the “Summary of the Invention” (page 2, lines 16-17), “Interlocking ribs are included on the profiles to create an airtight reclosable seal which is suitable for a wide range of applications.” It appears that Applicant’s “wide range of applications” for their “airtight seal” is much broader in scope than air molecules at atmospheric pressure and room-temperature as discussed by Tilman.

However, if Tilman’s fastener strip will not provide an airtight seal under ambient room conditions, it certainly will not provide one under increased or decrease pressure or temperature. Accordingly, Applicant respectfully requests reconsideration and allowance of Claims 1, 4-10, 18 and 19.

The Examiner further suggests that Figure 4 of Tilman’s ‘689 clearly shows a compression molded seal portion having a thickness less than the combined thickness of the first and second profile segments as is now claimed. However, Claim 1 and Claim

18, as amended claimed, “said compression molded segment seal portion having a thickness less than the combined thickness of said first profile segment and said second profile segment.” The compression molded segment seal portion referred to includes, “a fused section of said first and second profile strips formed through the application of heat and pressure, said fused section substantially flattened to form an airtight seal of said first and second profile strips without distorting said ribs or said first and second profile strips outside of said fused section, thereby maintaining said airtight seal of said first and second profile strips when interlocked.” Therefore, since Tilman does not teach an airtight seal under any definition of airtight, Figure 4 of Tilman cannot anticipate the compression molded seal of Claims 1 and 18 of the present invention. While it is true that Figure 4 of Tilman does show a seal portion between two fastener strips, which is thinner than the fastener strips, the seal portion does not teach, suggest or imply the compression molded segment seal portion which is airtight.

The Examiner has also rejected Claims 1, 4 through 10, 18 and 19 under the principles of *res judicata* based on the decision of the Board of Patent Appeals and Interferences in the original application from which this RCE was filed, MPEP §706.07(h). However, 706.07(h), paragraph XI, after the decision by the Board, indicates that an RCE is improper if it is not accompanied by the fee or submission of a showing of facts, as noted in 37 CFR 1.114, which includes an amendment to the written description claims or drawings, new arguments or new evidence in support of patentability ... Claim 1 has been amended. Claims 4 through 10 depend from Claim 1. Claim 18 has been amended and Claim 19 depends from Claim 18. In addition, applicant has submitted the Declaration of Paul Tilman, the Inventor of U.S. Patent No. 5,071,689,

cited as an anticipatory reference in the appeal before the Board of Patent Appeals and Interferences on the basis that the Tilman '689 reference inherently teaches a recloseable fastening strip having an airtight seal. Since Tilman has provided a declaration stating that his recloseable fastener, as disclosed in the '689 patent, does not teach an airtight seal under any circumstances, the applicant respectfully submits that MPEP §706.07(h) has been complied with and that Claims 1, 4 through 10, 18 and 19, as amended, should not be rejected under the principles of *res judicata* in view of the amendments to the claims and the newly submitted evidence of Tilman.

In their regard the case of *In re Craig*, 411 F.2d 1333, 162 U.S.P.Q. 157 (CCPA 1969) the court in following the case *In re Kaghan* 387 F.2d 398, 157 U.S.P.Q. 130 (CCPA 1967), discuss policy reasons why the Patent Office, including the Board of Appeals, should not adhere to a prior decision subsequently determined to be in error. *In re Rinehart* 551 F.2d 1048, 1989 USPQ 143 (CCPA 1976), the Board held that it was not proper for the Board of Appeals simply to adopt as prior opinion when the new application presented substantially similar claims, but a new issue of patentability. In the present case new issues of patentability have been presented and in view of the Declaration of Tilman, it is clear that the Board's prior interpretation of the scope of the Tilman reference was an error. Thus, the Board's previous decision should not stand. *In re Freid*, 312 F.2d 930, 136 USPQ 429 (CCPA 1963).

The most relevant case in this regard is *In re Russell*, 439th F.2d 1228, 169 U.S.P.Q. 426 (CCPA 1971) in which claims in Applicant's parent case were rejected on the grounds of obviousness in light of the prior art. The Applicant filed a new application asserting essentially the same claims, but submitting supporting affidavits under Rule

132, showing that the claimed compound exhibited “unexpectedly superior results is compared to prior art composition.” The Board of Appeals rejected the claims as *res judicata*. The Court reversed “we do not think the attempted distinction is sound. Here Appellant has made a new record presenting different questions of patentability even if the claims are viewed as identical to those in the prior case. There is a public interest in granting valid patents which must be considered against the public interest upon which *res judicata* is based.

2. Claims 1, 4-10, 18 and 19 stand rejected under 35 U.S.C. §102(b) as being anticipated by Howard ‘914. Applicant respectfully submits that the patent of Howard discloses a liquid tight not an airtight seal. The word “airtight” is not found in the Howard reference. Further, Howard teaches a plastic bead seal at the junction of the fastener and the side walls of a plastic container, not a compression molded seal as claimed in the present invention. As seen in Howard, a bead seal is formed, *see* Howard, Col. 3, lines 25-38. Thermal “impulse” sealing, as is known, is a process of welding thermoplastic films in which the layers to be welded are clamped by a pair of jaws, one of which is a resilient pressure jaw and the other of which is heater jaw. The heater jaw contains a heater element in the form of a metal strip of low heat capacity that can be instantly heater by an electrical current in which it will cool rapidly when the current is removed. After tightly closing the jaws over the film, electrical impulses are applied to the heater for a short period, usually less than one second, to heat the film to its welding temperature. After the weld has been allowed to cool under pressure, the jaws are opened and the welded film is removed.

Claims 1 and 18 of the present application claim a compression molded segment seal portion formed through the application of feed and pressure, not just heat as in the Howard reference.

As noted in Anderson '113, "Another practical consideration that makes the Howard process inferior is that, although the process does attempt to reduce escape gaps, it does so by deforming the actual sealing profile of the zipper closure. By borrowing material from the interlocking portions of the zipper closure to close escape gaps, the Howard process undesirably compromises the integrity of the zipper seal. Thus, although plastic bags made by the Howard process may be more leak-resistant (i.e. more gas-tight and liquid-tight) at rest than those bags made by other conventional techniques that did not eliminate escape gaps, such bags made by the Howard process would tend to open prematurely when subjected to even minor forces, for example, when the contents of a plastic falls against the zipper closure."

It should also be noted that the Examiner finally rejected the aforesaid claims on the basis of a newly cited reference to Howard '914. Therefore the rejection under Howard should have been a non-final rejection. Accordingly, reconsideration and allowance of Claims 1, 4-10, 18 and 19 are respectfully requested.

3. Claims 1, 4-10, 18 and 19 stand rejected under 35 U.S.C. §102(e) as being clearly anticipated by Anderson '113. The patent of Anderson discloses a plastic bag with a zipper closer which is gas-tight by means of a gap filling fillet 60 found in Column 5, lines 23-28 of Anderson. The fillet is a completely separate element from the fastener strip. Claims 1 and 18 of the present invention claim the compression molded segment seal portion as including a fused section of the first and second profile strips substantially

flattened to form an airtight seal without distorting the ribs and the compression molded segments seal portion having a thickness less than the combined thickness of the first profile segment and second profile segment. Anderson, to the contrary, has additional material in the form of the fillet attached to the fastener, and it is the fillet that forms the airtight seal, not the fused sections of the first and second profile strips. Accordingly, reconsideration and allowance of Claims 1, 4-10, 18 and 19 is respectfully requested.

4. Claim 18 stands rejected under 35 U.S.C. §102(e) as being anticipated by Sprehe et al. '457. This rejection is respectfully traversed.

The Patent of Sprehe, as noted by the Examiner, is assigned to Applicant, and Donald Wright is a co-inventor in both cases. The Examiner asserts that the patent of Sprehe discloses, but does not claim, the present invention. However, the patent of Sprehe both claims and discloses a reclosable bag in which leakage at the end of the fastener strip is prevented by providing flanges having sufficient thickness so that, when sealed, the flanges melt sufficiently to provide a gas barrier. Compression molding is never mentioned as shown in Figure 4, Column 4, lines 45-57:

In the preferred embodiment the flanges are eight thousandths of an inch thick at its end, increasing to fourteen thousandths, on the consumer side of the strip, and thirteen thousandths thick on the end of the product side flange increasing to fifteen thousandths near the profile. This increased thickness makes the fastener profiles more difficult to open from the product pushing against the interlocked profiles. These thick flanges provide sufficient material so that when sealed to bag 12, the flanges melt sufficiently to provide a gas barrier. Second strip 24 similarly has second strip flanges 24A and 24B extending laterally therefrom, which are also at least seven thousandths thick for sealing to provide a gas barrier.

As further noted in the specification and claims of the '457 reference, the respective first ends and second ends of the first and second strips are joined by heat crimping. "Crimping" is defined by *Webster's New Collegiate Dictionary* as "to cause to

become wavy, bent, or warped." The compression molding segments seal portion of Claims 1 and 18 fuses the profile strips and substantially flattens the end seal portion to provide an airtight seal without distorting the ribs of the first and second profile strips outside of the fused section. Clearly this sealing using compression molding without distortion is not disclosed in Sprehe '457.

In addition, the '457 reference is owned by the same assignee as the present application, Com-Pac International, Inc. Further, Donald Wright is a co-inventor of both applications. The Examiner has suggested Applicant swear back of the Sprehe et al. reference, or that Sprehe, Siebert and Wright swear that the unclaimed invention of Sprehe et al. was derived from Applicant.

In the Amendment of August 30, 2004, Applicant believed that Donald L. Wright co-inventor of the present application was the inventor of the invention disclosed but not claimed in Claim 18. This has now been confirmed and a 37 CFR. §132 declaration will be filed in connection therewith.

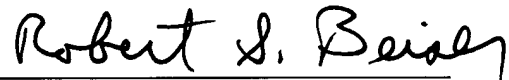
The Examiner has indicated that this is sufficient to remove the Sprehe reference as prior art. Accordingly, reconsideration and allowance of Claim 18 is respectfully requested.

CONCLUSION

The claims defining over the prior art, including that of record and the prior art totally lacking any teachings or suggestions of making the claimed combination, this Honorable Board is respectfully requested to reverse the decision of the Examiner rejecting those of Claims 1, 4-10 and 18 and 19, which were rejected in the Official Action of May 28, 2004 and to indicate that the claims herein appealed from are allowable to applicant.

The Commissioner is authorized to charge our deposit account No. 22-0259 in the amount of \$170 or any other fees required to cover the cost of filing this Brief..

Respectfully submitted,




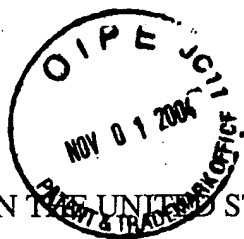
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Dated: November 1, 2004

EXPRESS MAIL CERTIFICATE
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This is to certify that the foregoing APPELLANT'S BRIEF is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 C.F.R. § 1.10, on the date indicated below and is addressed to the Assistant Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313-1450, on this 1st day of November 2004.


Carmen M. Camarena



PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: WRIGHT et al.
Appeal No. 2003-0068
Application No. 09/415,696
Filing Date: October 12, 1999

Examiner: J. Pascua
Art Group: 3727
Atty. Docket No. 21276.00.9044

Title: **RECLOSABLE FASTENER PROFILE SEAL AND METHOD OF
FORMING A FASTENER PROFILE ASSEMBLY**

DECLARATION OF PAUL A. TILMAN

I, Paul A. Tilman, of W4582 Forest Lane in Sherwood, Wisconsin, 54169 declare that:

1. I am of lawful age, and if called upon to testify, I could and would competently testify to the facts set forth herein.

2. I am currently employed by Alcoa Consumer Products (Presto Products), 670 North Perkins Street, Appleton, Wisconsin 54192 as a Research and Development Manager and have been employed by Alcoa (Presto Products) since February 10, 1997.

3. I have 34 years of industry experience as a designer and as an inventor in the field of reclosable flexible plastic bags, which includes methods and apparatus for manufacturing recloseable bags, reclosable seals for plastic bags and methods and devices for manufacturing recloseable seals for plastic bags.

4. I am the sole inventor of U.S. Patent No. 5,071,689. I am also named as an inventor or co-inventor on approximately fifty (50) other U.S. and foreign patents that relate to reclosable flexible bags, seals for flexible bags and manufacturing seals for

flexible bags. I have been informed that my '689 patent has been cited by U.S. Patent Examiner Jes F. Pacua as inherently teaching an "airtight seal."

5. I am skilled in the art of recloseable seals for flexible bags, because of my years of industry experience, and because of the number of issued U.S. patents that bear my name as an inventor.

6. As one of skill in the art of recloseable plastic bags, an "airtight seal" is a seal that will at least prohibit the movement of atmospheric pressure, room-temperature air molecules across the seal for an indefinite length of time.

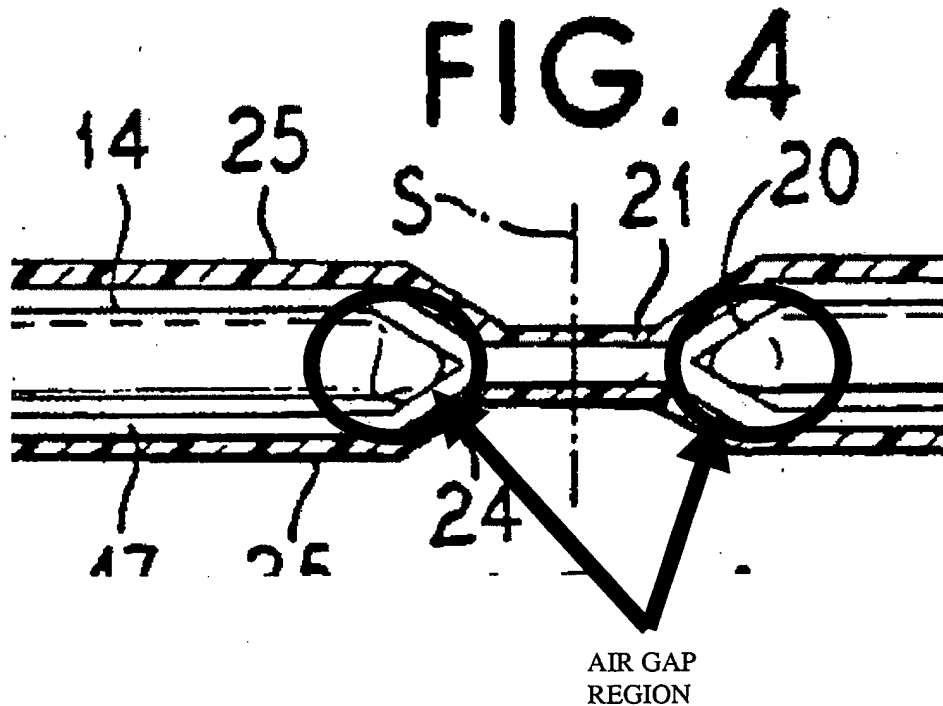
7. As the sole inventor of U.S. Patent No. 5,071,689, I am the person most knowledgeable about the seal structure and sealing methodology disclosed and claimed in the patent.

8. As the sole inventor of the '689 patent and as one of skill in the art, I know that the "spot sealing" as taught in the '689 patent will not provide a recloseable seal that will be an airtight seal. "Spot sealing" will not provide an airtight seal, because the spot sealing means 19 shown in FIG. 1 of the '689 patent completely or nearly completely flattens the female base 14 and the male rib or arrow-shaped protuberance 15, which together comprise recloseable zipper strips 10 and 11. When the female base 14 is flattened or even nearly completely flattened by the sealing means 19, there is no structure into which a male protuberance 15 can extend: there is no structure that provides any seal.

9. FIG. 3 of the '689 patent is an enlarged fragmentary plan view of the hinge portion of a zipper strip. FIG. 4 shows an edge elevational view of the zipper strip show fragment shown in FIG. 3.

10. FIG. 3 and FIG. 4 both show that the female base 14 and the arrow-shaped protuberance 15 that form a seal, do not extend all the way to where the spot seal/hinge 21 is formed by the spot sealing means 19. The female base 14 and the arrow-shaped protuberance 15 do not extend all the way to the seal because of deformation caused by local thermal and mechanical deformation of the base 14 and protuberance 15 caused by the spot sealing means 19.

11. FIG. 4 of the '689 patent shows a small space between the spot seal /hinge 21 and the terminal extent of the female base 14 / protuberance 15 where there is no seal structure. This space is encircled and identified as an "AIR GAP REGION" in the copy of FIG. 4 that appears below.



12. The "AIR GAP REGION" shown in FIG. 4 provides a passageway for air and other gas molecules. The AIR GAP REGION is an artifact of "spot sealing."

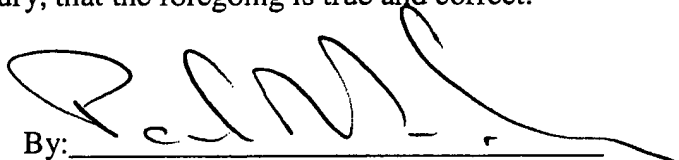
13. As the sole inventor of the '689 patent and as one skilled in the art of recloseable seals for plastic bags, the structure and method disclosed and claimed in the '689 patent does not explicitly or inherently provide a seal that is airtight under any definition of "airtight." The structure and method disclosed in the '689 patent will inherently leak air and other gaseous molecules through an air gap located between the extent of the sealing structures 14 and 15 and the spot seal produced by spot sealing means.

I declare under the penalties of perjury, that the foregoing is true and correct.

Dated:

29th Aug 03.

By:



Paul A. Tilman

State of Wisconsin

County of Outagamie

Before me personally appeared said Paul A. Tilman and acknowledge the foregoing instrument to be his free act and deed this 29 day of August, 2003.

Seal

Gyromme A. Kahl
(Notary) My Commission Expires
3-18-07